03-0624 M.A.F. v. Quality Park Products Issued: 7/29/05

M. A. F. asks the Utah Labor Commission to review Administrative Law Judge Marlowe's denial of Mr. F.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. F. allegedly suffered a back injury while working for Quality on November 12, 2001. On June 23, 2003, he filed an application with the Commission to compel Quality Park Products and its workers' compensation insurance carrier, Fidelity & Guaranty Insurance (referred to jointly as "Quality" hereafter) to pay workers' compensation benefits for his injury. Shortly before the hearing on his claim, Mr. F. discharged his attorney. Judge Marlowe denied Mr. F.'s request for a continuance and Mr. F. represented himself at the hearing.

On December 31, 2004, Judge Marlowe denied Mr. F.'s claim for failure to prove his work at Quality was the legal cause of his injury. Mr. F., through a new attorney, requested Commission review of Judge Marlowe's decision. Mr. F. argues 1) he should have been granted a continuance of the evidentiary hearing and 2) he has established legal causation.

FINDINGS OF FACT

Procedural facts. Because Mr. F. challenges Judge Marlowe's refusal to grant a continuance of the evidentiary hearing in this matter, the procedural history of Mr. F.'s claim is set out in some detail below.

As already noted, Mr. F. filed his application on June 23, 2003. At that time, he was represented by Mr. Prisbrey. Mr. Dyer, Quality's attorney, filed an answer that denied liability for Mr. F.'s claim. On February 19, 2004, the Commission's Adjudication Division issued notice that a formal hearing would be held on Mr. F.'s claim on June 1, 2004, in St. George, Utah, with Judge Marlowe presiding.

On May 27, 2004, two business days before the hearing, Judge Marlowe received a telephone message from Mr. Prisbrey and Mr. Dyer reporting that Mr. F. wanted to "fire" Mr. Prisbrey. After unsuccessfully trying to reach Mr. Prisbrey and Mr. Dyer, Judge Marlowe left a telephone message with each attorney that she intended to proceed with the hearing and that Mr. F. could decide whether to proceed *pro se* or with Mr. Prisbrey as his attorney.

Later on May 27, 2004, Mr. Prisbrey and Judge Marlowe spoke by telephone. Judge Marlowe reiterated her intention to proceed with the hearing. Mr. Prisbrey stated that he wanted to withdraw as Mr. F.'s counsel because of "conflict of interest." Judge Marlowe asked for written explanation; Mr. Prisbrey faxed a brief letter stating that on May 26, 2004, it became "relatively

apparent" that a conflict of interest existed between him and his client. Mr. Prisbrey did not disclose the nature of this sudden conflict on the grounds disclosure would breach client confidentiality.

On May 28, 2004, Judge Marlowe denied Mr. Prisbrey's request to withdraw on the grounds he had not submitted a sufficient justification for withdrawal. Judge Marlowe faxed her ruling to Mr. Prisbrey and Mr. Dyer. Then, later on May 28, Judge Marlowe received a faxed copy of a letter from Mr. F. advising Mr. Prisbrey that Mr. Prisbrey's services were no longer required. However, Mr. F. then asked Mr. Prisbrey to "notify the court and all parties concerned that I need a postponement of this trial to seek other council."

Judge Marlowe immediately responded with a letter to Mr. F.. Judge Marlowe noted Mr. F.'s letter terminating Mr. Prisbrey's services but advised Mr. F. that "[b]ecause you have elected to terminate your attorney at the last minute, I expect you to appear and present your case to me yourself at the appointed time, or you will be defaulted and your case dismissed." This letter was sent to Mr. F. by federal express; it was also faxed to Mr. Prisbrey and Mr. Dyer.

On June 1, 2004, Judge Marlowe commenced the hearing as scheduled. Both Mr. F. and Mr. Prisbrey were present. After some preliminary discussion, Mr. F. confirmed that he discharged Mr. Prisbrey but also stated that he was not prepared to proceed on his own behalf. Judge Marlowe confirmed her previous ruling denying any continuance and requiring Mr. F. to proceed with the presentation of his claim.

Facts regarding legal causation. Judge Marlowe accepted Mr. F.'s testimony that he injured his back as he stood from a squatting position while pulling and twisting on a board nailed to a pallet. The Commission has carefully reviewed the entire record and, as discussed below, finds Mr. F.'s account of his accident to be unpersuasive for the following reasons.

Immediately after the event in question, Mr. F. explained to several co-workers the activity that had caused his back pain. He did not report any pulling or twisting, but merely stated that he had bent over to pick up a board and experienced sudden back pain. Likewise, immediately after the incident, Mr. F. began to receive medical attention. This medical treatment continued for several months with several different medical providers. In describing the onset of his back pain to these medical providers, Mr. F. reported that he had bent over to pick up a piece of wood and felt acute pain and numbness. There was no report of pulling or twisting.

Mr. F. gave these accounts of his injury to several different co-workers and physicians. These descriptions were made close to the time of the accident and are consistent in the description of Mr. F.'s activity as "bending over to pick up a board." This is substantially different from Mr. F.'s later testimony at hearing that he was "pulling and twisting" on a pallet board. The Commission finds Mr. F.'s original descriptions of his activities at work to be more persuasive than the account he gave during the evidentiary hearing. The Commission therefore finds that Mr. F.'s back pain occurred as he bent over to pick up a board while working at Quality on November 12, 2001. Judge Marlowe's findings of fact are amended accordingly.

DISCUSSION AND CONCLUSION OF LAW

Mr. F. contends Judge Marlowe should have continued the evidentiary hearing in this matter to allow Mr. F. to obtain new counsel. While a continuance is sometimes appropriate, unjustified continuances subject the parties to increased expense and inconvenience. Continuances not only delay resolution of the case that is continued, but delays resolution of other cases waiting for hearing. When continuances are requested immediately before hearing, it must be shown that the continuance is necessary for substantial reasons beyond the requesting party's control.

In considering whether a continuance should have been granted in this case, the Commission notes the hearing had been scheduled for several months. No continuance was requested until two business days before the hearing, purportedly because of "conflict" between client and attorney. Mr. F.'s attorney refused to explain the nature of the purported conflict. Then, when Judge Marlowe declined to permit the attorney's withdrawal, Mr. F. and his attorney devised another strategy to obtain a continuance--Mr. F. discharged his attorney. As stated on page 2 of Mr. F.'s motion for review submitted to the Commission (emphasis added):

> . . . Mr. F.'s attorney made a motion to withdraw as counsel due to an undisclosed conflict between him and his client (a disagreement over settlement options). The motion was denied by the ALJ due to the late hour of the request and because the reasons for the withdrawal were not set forth. **Because that failed, the attorney had Mr. F. write him a letter terminating his services and then provided that letter to the ALJ on the Friday before the hearing.**

Faced with Mr. F.'s last-minute discharge of his attorney, Judge Marlowe immediately notified Mr. F. and his attorney of the consequences of this action. In her letter of May 28, 2004, Judge Marlowe informed Mr. F.:

> Because you have elected to terminate your attorney at the last minute, I expect you to appear and present your case to me yourself at the appointed time, or you will be defaulted and your case dismissed.

Then, at the commencement of the hearing on June 1, 2004, Judge Marlowe again gave Mr. F. the choice of either allowing Mr. Prisbrey to continue representing him or proceeding on his own. Mr. F. chose to proceed on his own.

With these facts in mind, the Commission concludes that Mr. F.'s reason for requesting a continuance was not substantial and was within the control of Mr. F. and his attorney. The Commission finds that Judge Marlowe properly denied Mr. F.'s request to continue the hearing.

Turning now to the merits of Mr. F.'s claim for benefits, the Utah Workers' Compensation Act provides benefits to workers injured by accident "arising out of and in the course of" employment. Utah Code Ann. §34A-2-401. To qualify for benefits under the foregoing standard, an injured worker must establish that his or her work was **both** the "legal cause" and the "medical cause" of the injury in question. Allen v. Industrial Commission, 729 P.2d 15, 25 (Utah 1986). The central issue in Mr. F.'s claim is whether his exertions at work on November 12, 2001, satisfy the requirement of legal causation.

In Price River Coal Co. v. Industrial Commission, 731 P.2d 1079, 1082 (Utah 1986), the Utah Supreme Court described the test for legal causation as follows:

> Under Allen, an usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, if the claimant suffers from a pre-existing condition, then he or she must show that the employment activity involved some unusual or extraordinary exertion over and above the "usual wear and tear and exertions of nonemployment life." . . . . The requirement of "unusual or extraordinary exertion" is designed to screen out those injuries that result from a personal condition which the worker brings to the job, rather than from exertions required of the employee in the workplace. (Citations omitted.)

Mr. F. concedes he suffered from a preexisting back condition at the time of his work accident. He must therefore meet the more stringent prong of the Allen test for legal causation in order to qualify for workers' compensation benefits. To determine whether a particular work activity is an "unusual or extraordinary exertion," the Commission compares the work activity to other typical activities and exertions experienced by men and women in modern nonemployment life. Allen at 26.

The work activity that produced Mr. F.'s back pain was bending over to pick up a board. The Commission recognizes that this type of exertion is one of the most commonplace exertions of modern nonemployment life, similar to bending to pick up tools, toys, or any number of items around the house. The Commission therefore concludes that Mr. F. has failed to establish the unusual or extraordinary exertion that is necessary to meet the more stringent prong of the Allen test for legal causation. Because Mr. F. has not established legal causation, his claim must be denied.

ORDER

The Commission affirms Judge Marlowe's decision and denies Mr. F.'s motion for review. It is so ordered.

Dated this 29th day of July, 2005.

R. Lee Ellertson, Commissioner